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Summary record of the 3089th meeting*
Held at the Palais Wilson, Geneva, on Tuesday, 22 July 2014, at 10 a.m.

Chairperson: Sir Nigel Rodley

Contents

Organizational and other matters

Draft general comment No. 35 on article 9 of the Covenant (continued)

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The meeting was called to order at 10.05 a.m.

Organizational and other matters

Draft general comment No. 35 on article 9 of the Covenant (continued)
(CCPR/C/GC/R.35/Rev.3)

1. **The Chairperson** invited the Committee to consider the amended wording of paragraphs 15 and 19 (documents without a symbol circulated in the meeting room) prepared by the Rapporteur on the basis of proposals made at previous meetings.

Paragraph 15

2. **Mr. Neuman** (Rapporteur for the general comment) said that paragraph 15 had been redrafted under the leadership of Mr. Kälin.

3. **Mr. Kälin** said the paragraph fully reflected previous suggestions and discussions. The final sentence had been rewritten; he suggested it should be footnoted to refer the reader to paragraph 63 on the relationship between articles 4 and 9 of the Covenant.

4. **Mr. Shany** proposed adding the words "per se" in the last sentence to clearly indicate that even where security detention was regulated by another body of law it was still arbitrary if it did not comply with the requirements of that body of law.

5. **Mr. Salvioli** agreed with the basis of Mr. Shany's proposal but instead proposed the words "in principle", which should be inserted after "international humanitarian law". The general comment should in no way imply that the application of international humanitarian law precluded application of the Covenant.

6. **Mr. Neuman** said that the wording of Mr. Shany's proposal implied that detention authorized by international law posed more, not less, of a problem than other detentions. In order to provide for unanticipated discrepancies, however, Mr. Salvioli's proposal would serve as a solution. Another phrase could be added to express the idea that security detention needed not only to be regulated by but also to comply with international humanitarian law.

7. **The Chairperson**, speaking as a member of the Committee, said that he supported the proposal to add the words "in principle" after "international humanitarian law". He also proposed the addition of "and complying with" after "regulated by" in the last sentence.

8. **Ms. Chanet** pointed out that it was crucial to account for unforeseen circumstances and to make exceptions, even if the Committee could not turn to precedents on which to base its comment.

9. **Mr. Seetulsingh** asked whether the same issue was addressed in paragraph 63.

10. **The Chairperson** said that there was a connection between paragraphs 15 and 63, as paragraph 63 referred to the possibility of derogating from article 9.

11. **Mr. Neuman** said that the amended paragraph should be adopted provisionally but discussion on it would not be closed.

12. **Mr. Iwasawa** asked whether the third sentence covered the idea of an imminent threat.

13. **Mr. Neuman** said that the word "present" in the third sentence conveyed the notion of imminence.

14. *Paragraph 15, as amended, was provisionally adopted.*

Paragraph 19

15. **Mr. Neuman** said that the revised paragraph contained new language: it replaced the words "less restrictive alternatives" in the fifth sentence with the stronger expression "measure of last resort"; it omitted the word "guardian" in the sixth sentence, which could be misconstrued as an expression of approval for outdated guardianship regimes; and it employed stronger wording in the final sentence to clearly convey the Committee's intention to enforce limitations contained in the Covenant.

16. **Mr. Zlătescu** proposed that the word "views" in the sixth sentence should be replaced with "decisions" or "options", which seemed less subjective than "views".

17. **Mr. Shany** agreed that the word "views" was too broad and proposed "wishes" as a replacement, which had stronger overtones. In addition, the word "mere" should be deleted from the fourth sentence, which would bring the language into line with the Covenant.

18. **Mr. Fathalla** agreed that "views" should be replaced with "wishes" because the "views" of persons with psychosocial and mental disabilities could not always be determined.

19. **Ms. Majodina** said that she supported the revised paragraph, which represented progress towards the prohibition of detention on grounds of mental health.

20. **Mr. Vardzelashvili** said that the word "views" should be maintained since all individuals had such thoughts, even if they were not able to formulate them clearly. The individual's "wishes and interests", referred to in the second part of the sixth sentence needed to be protected regardless of the individual's "views".

21. **Ms. Seibert-Fohr** said that referring to the "views" rather than the "wishes" of persons with mental disabilities implied a greater respect for those persons; the current text should therefore be maintained.

22. **Mr. Shany** proposed using "views and wishes" to accommodate the different positions expressed.

23. **Ms. Waterval** said she fully supported the existing revised paragraph.

24. **Mr. Fathalla** considered that the terms under discussion should be consistent in both parts of the sentence.

25. **Mr. Seetulsingh** said that the word "interests" encompassed a person's views and therefore proposed that the phrase "wishes and interests" should be employed in both instances for consistency.

26. **Mr. Zlătescu** said that the third sentence of the revised paragraph should refer to family support, as proposed by Mr. Rodriguez-Rescia in a previous discussion.

27. **Mr. Iwasawa** agreed with the proposal to use the phrase "wishes and interests" in both instances.

28. **The Chairperson** said that confusing "interests", which were objective, with "views" or "wishes", which were subjective, would be a serious mistake. It was a question of an individual's autonomy that was at stake, and it must not be weighed against some allegedly objective understanding of the interests of that individual, which should be protected by the representative. In addition, the word "wishes" was stronger than "views" as an expression of the will of the individual.

29. **Mr. Neuman** said that the first part of the sixth sentence aimed to make the point that the individual's contributions must be respected in the decision-making process, but not that decisions must comply with the individuals' expressed wishes, which would contradict the rest of the paragraph. The term "respect for the wishes", if adopted, could be

misinterpreted as "complying with the wishes". The second part of the sentence addressed the conflict of interest between the individuals concerned and their representatives. He agreed that the word "mere" in the fourth sentence could be deleted.

30. **The Chairperson** said it was axiomatic that a disability must not justify a deprivation of liberty and it seemed stylistically inappropriate to delete the word "mere". Another suggestion was the use of "in itself" to retain the intention of the sentence.

31. **Mr. Rodríguez-Rescia** said that the word "mere" should be maintained to preserve the meaning of the sentence. He supported the revised paragraph.

32. **Mr. Neuman** agreed that the word "mere" should be deleted and the words "in itself" inserted after "shall not" in the fourth sentence.

33. *Paragraph 19, as amended, was adopted.*

Paragraph 20

34. **Mr. Neuman** said that one comment had been received in relation to paragraph 20 from Belarus, which rejected the notion that early release should be evaluated for arbitrariness. However, that comment did not call for consideration.

35. **Ms. Chanet** said that the fourth sentence was not clear. If conditional release was annulled on grounds of a breach of conditions, the ensuing detention could not be considered arbitrary. Given that there was no corresponding footnote, she wondered what the source of that sentence had been.

36. **Mr. Kälin** agreed that the fourth sentence did not clearly express the Committee's intentions. He proposed ending the second sentence with the words "with domestic law" and continuing with a third sentence which would read "Consideration for parole or other forms of early release must be in accordance with the law and such release must not be denied on arbitrary grounds within the meaning of article 9". He proposed the insertion of footnote marker 79 after the words "with the law" since that reference concerned the law rather than issues of arbitrariness.

37. **Mr. Bouzid** said that there could in fact be cases where denial of release was arbitrary and ran counter to article 9. Equally, early release could be arbitrary if it was granted on discriminatory grounds of, for example, language or religion.

38. **Mr. Rodríguez-Rescia** said that the fourth sentence of the Spanish version was not clear either. He proposed that it should be replaced with the following: "The deprivation of liberty would not be arbitrary when conditional release is revoked for breach of the conditions under which it was granted".

39. **Mr. Zlătescu** proposed replacing "A prediction of the prisoner's future behaviour" in the last sentence with "An assessment of the prisoner's present behaviour" since predictions were often made on tenuous grounds.

40. **The Chairperson** said that although basing release on a fragile prediction was an issue of concern, it was neither feasible nor appropriate to exclude from parole boards the function, before granting release, of predicting the likelihood that a prisoner would abscond.

41. **Mr. Zlătescu** said that, under certain legal systems, persons on parole reported to a parole officer on a daily basis, thereby enabling the officer to carry out a daily assessment of that person's behaviour.

42. **Mr. Kälin** proposed replacing the word "prediction" with "prognosis" since only prophets could make predictions.

43. **Mr. Neuman** said that the Committee acknowledged the difficulty in predicting future behaviour in the second sentence of paragraph 21, which it had decided to separate from the final sentence of paragraph 20 during the earlier reading of the draft.

44. He recalled that, in the initial draft, the fourth sentence had contained a footnote with a cross reference to the case of *Manuel v. New Zealand*, in which the Committee had assumed *arguendo* that recall from parole was a deprivation of liberty and therefore subject to article 9 of the Covenant. The footnote had subsequently been removed as it provided only limited support to the sentence, but the issue of recall from parole was pertinent, as illustrated by the fact that it had arisen in a communication. He would welcome alternative drafting proposals if the Committee considered them necessary.

45. In response to a concern raised by Mr. Bouzid, he agreed that denial of parole or other forms of early release could sometimes be arbitrary; wording of the third sentence was intended to avoid such arbitrariness.

46. **The Chairperson** said the text should reflect the fact that legitimate breaches of parole conditions did not provide grounds for returning persons to prison.

47. **Mr. Shany**, referring to the fourth sentence, proposed replacing the words "for breach" with "on the basis of information suggesting a breach", which would imply that a process was needed in order to determine whether or not breaches were justified.

48. **The Chairperson** said that he was reluctant to offer an instant drafting solution for the fourth sentence, which should be left in square brackets for further consideration at a later meeting.

49. **Mr. Neuman** recalled that the word limit had to be taken into account. The fourth sentence was intended to address the issue of parole revocation in general terms, and should not include a list of situations in which revocation would or would not be justified.

50. **Mr. Kälin** suggested redrafting the second and third sentences to read: "Convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law. Consideration for parole or other forms of early release must be in accordance with the law, and such release must not be denied on arbitrary grounds within the meaning of article 9". He proposed deleting footnote 78 and placing footnote marker 79 after the words "in accordance with the law".

51. **Mr. Neuman**, referring to the final sentence, said that he preferred the term "prediction" to the more scientific "prognosis", particularly as it was the word that the Committee had tended to use in the past.

52. **The Chairperson** said he took it that the Committee wished to adopt the paragraph as amended by Mr. Kälin, with the exception of the penultimate sentence, which would be left in abeyance until a later meeting. In the final sentence, the word "prediction" would be retained.

53. *It was so decided.*

Paragraph 21

54. **Mr. Neuman** said that Switzerland had sought confirmation that the "periodic reviews" mentioned in the first sentence could be considered either ex officio or on application, which they could. The United States had asked whether the reference to "civil preventive detention" in the final sentence prohibited separate proceedings for civil commitment or immigration detention pending removal, which it did not. Although the United Kingdom had raised concerns over the stated need for conditions of post-conviction preventive detention to be distinct from those for prisoners serving a punitive sentence, the original interpretation and wording should stand.

55. **Ms. Seibert-Fohr** said that she had doubts about the substance of the paragraph. Some of the comments from States parties indicated a lack of understanding of what the Committee was trying to say. The purpose of the paragraph was, ostensibly, to develop a coherent standard for disparate issues, as the three cases cited in the footnotes were different in nature. While she agreed with the Committee's findings in those cases and with its concluding observations on the sixth periodic report of Germany (CCPR/C/DEU/CO/6), she was concerned about whether a single, generalized standard could be applied to a range of system-specific situations. As an alternative, the Committee might consider reverting to its practice of evaluating the sentencing schemes in States parties individually and identifying shortcomings. In any event, it should be aware of the risks involved in setting a very high standard for States parties.

56. **Mr. Ben Achour** said that the word "preventive" was normally associated with pretrial detention and should consequently be avoided. He proposed that, in the French text, the term "*détention préventive*" should be replaced with "*rétention de sûreté*".

57. **Ms. Chanet** said that vague or inaccurate language might also have affected the interpretation of the paragraph in English, as there was a mistaken sense that it was addressing different issues, when in fact it dealt exclusively with post-conviction preventive detention, albeit under various systems. She therefore agreed with the substance of the paragraph, but proposed that the second sentence should be reworded to express the idea that, where necessary, procedural guarantees should include expert assessments of the likelihood of reoffending.

58. **Mr. Rodríguez-Rescia** agreed with Mr. Ben Achour that the reference to "preventive detention" was incompatible with the content of the paragraph. He accordingly proposed that, in the third sentence of the Spanish version, the words "*la reclusión preventiva*" should be replaced with "*medios preventivos de reclusión*".

59. **Mr. Shany** said that he had concerns over the open-ended nature of post-conviction preventive detention, which could lead to the imposition of life sentences for less serious crimes.

60. **The Chairperson**, speaking as a member of the Committee, said that the wording of the paragraph might have to be amended to make it clear that such detention should not be imposed for minor offences.

61. **Mr. Neuman** said that, while the linguistic problems could be resolved relatively easily, the substantive issues posed a greater challenge. The Committee had to decide whether to deal with post-conviction preventive detention in general terms, avoid it completely, or impose limits on it, as it had done in the past. In the third sentence, the words "as a measure of last resort" were intended to prevent States parties from applying the measure for petty crimes, but the wording could be rendered more explicit if the Committee wished.

62. In response to a question from **Mr. Bouzid**, he said that, while post-conviction preventive detention was not imposed universally, its use was spreading. He was thus inclined to tackle the issue despite its complexity, though the Committee should be careful not to make the paragraph so specific as to be readily evaded.

63. **Ms. Chanet** said that the inclusion of the words "as a measure of last resort" did not protect petty criminals who were repeat offenders from post-conviction preventive detention. Use of the measure should be limited to particularly serious crimes, and the Committee might refer to relevant decisions of the European Court of Human Rights in establishing what those limits should be.

64. **Mr. Shany** said that the notion of proportionality should be introduced to ensure that the length of deprivation of liberty, whether punitive or preventive, reflected the gravity of the offence.

65. **Mr. Neuman**, referring to the concerns that had been raised with regard to terminology, said that the addition of a footnote in various languages might help clarify what the Committee was and was not referring to. It was particularly important to ensure that the form of detention in question was not confused with the security detention addressed in paragraph 15.

66. **The Chairperson** said that, in the English version, the word "safety" might be used to ensure that the distinction was clear. He suggested that the Rapporteur redraft the paragraph in the light of the suggestions made and any further proposals submitted after the meeting.

67. *It was so decided.*

Paragraph 22

68. **Mr. Neuman** said that the paragraph marked the beginning of a subsection on the topic of unlawful detention. Although a source had suggested expanding the principle of legality, he would prefer to adopt the paragraph as it stood.

69. **Mr. Kälin** said that the second sentence might be developed by specifying that the substantive grounds for arrest or detention must be prescribed by law in an exhaustive manner.

70. **Mr. Neuman** said that one possible solution would be to replace the word "prescribed" with "fully enumerated".

71. **Ms. Seibert-Fohr**, supported by **Mr. Fathalla**, proposed that the second sentence should start with the word "Any" instead of "The".

72. **Mr. Fathalla** proposed that the second sentence should be recast to include the requirement that the grounds for arrest or detention should be interpreted narrowly.

73. **Ms. Chanet**, supported by **Ms. Majodina**, considered that the organization of part II of the draft general comment was strange and should be modified to better convey the overlap between unlawful detention and arbitrary detention. It would be more logical to begin by dealing with the former and move on to cover the latter.

74. **Mr. Neuman** said that the relationship between the two concepts was addressed in paragraphs 10 to 12.

75. **The Chairperson** said the Committee appeared to agree that Ms. Seibert-Fohr's proposal met concerns about the first half of the sentence. As to the second half of the sentence, he suggested adding the words "and should be narrowly interpreted" after "arbitrary application".

76. **Mr. Fathalla** suggested adding the words "and narrow interpretation" after "sufficient precision" in the second sentence.

77. **Ms. Seibert-Fohr** said that she would favour the wording "so as to avoid narrow interpretation". If the Committee were to use the formulation "not interpreted broadly", it might be seen to second-guess the first requirement for the law to be drafted in concrete terms.

78. **Mr. Neuman** said he was uncomfortable with the notion that the grounds for detention should be interpreted narrowly in all cases, which could give rise to problems for the Committee in terms of domestic interpretation of the language of the laws of States

parties in the future. In his view, the suggestion by Ms. Seibert-Fohr would avoid such problems. He cautioned against extending the principles of narrow interpretation of criminal statutes to article 9 as a whole.

79. **Mr. Kälin** agreed with the Rapporteur. From the perspective of individual communications, a reference to "narrow interpretation" would require the Committee to look in depth at States parties' domestic laws in order to determine how they had interpreted them. The reference to arbitrariness provided sufficient protection to deal with problematic cases.

80. **Ms. Chanet** said that the last two sentences were repetitive and confusing in that they reverted to the issue of unlawfulness, which was dealt with in paragraphs 10, 11 and 12. In her view, it would be more logical to restructure the paragraphs so that all the references to unlawfulness were grouped together at the beginning.

81. **The Chairperson** invited the Rapporteur to give some thought to the suggestion to have the paragraphs on unlawfulness precede those on arbitrariness and return to the issue at a later stage. Turning again to the second sentence, he proposed inserting the words "interpretation or" before "application".

82. *The proposal was adopted.*

Paragraph 23

83. **Mr. Neuman** said that paragraph 23 drew a distinction between violations of domestic detention procedures that were significant enough to be considered violations of article 9, paragraph 1, and those that were not. Ireland had drawn the Committee's attention to a decision involving the suppression of statements given during questioning after the suspect had requested counsel, which did not need to be addressed in paragraph 23. Australia had made the observation that access to counsel was an issue under article 14 of the Covenant, but seemed to be confusing allowing the person detained to consult their counsel with the right to be provided counsel at Government expense. The United States and a number of NGOs appeared to think that the paragraph specified best practices rather than describing categories of rules of domestic law to be taken into account in deciding whether the detention would be unlawful if the State violated its own laws. Further safeguards recommended as best practice were addressed in part VII. He was not persuaded by the suggestion by Amnesty International to replace "such issues" with "such or similar issues" in the last sentence. He did, however, agree with the drafting proposal made by a group of NGOs to replace the word "suspects" with "individuals" in the third sentence.

84. **Mr. Ben Achour** questioned the usefulness of the last sentence. It was clear that violations of rules of procedure not linked to article 9 did not need to be taken into account. Referring to the wording "*ces aspects*" in the French version, he said that the issues mentioned had been given by way of example and were not an exhaustive list. The use of the word "*nécessairement*" could also give rise to problems of interpretation. He therefore proposed deleting that sentence.

85. **Ms. Chanet** also expressed concern at the ambiguity of the paragraph, which appeared to suggest that the obligations under article 9 applied only to those countries that had actually established domestic rules providing safeguards for detained persons.

86. **Mr. Flinterman** said that he agreed with the text as presented by the Rapporteur. At the beginning of the first sentence, he proposed adding the words "Article 9 requires that" and adjusting the second sentence to read "Article 9 further requires" to make it clear at the outset that it was an obligation for States parties to establish such procedures.

87. **Mr. Seetulsingh** agreed with Ms. Chanet that the emphasis on domestic rules suggested that the Committee would be limited by them. The jurisprudence of the

Committee went much further than domestic rules. Attention should be drawn to the remaining paragraphs of article 9.

88. **Mr. Ben Achour** said that, although paragraph 23 referred to domestic law, it was also prescriptive in that it stipulated "Article 9 requires that …".

89. **Mr. Shany** proposed rewording the end of the first sentence to read "prescribed procedures which must give effect to the relevant provisions of the Covenant". He agreed that perhaps the last sentence could be deleted, as it was somewhat unclear and the case cited in the footnote involved a matter covered by article 9 which was dealt with in ways that went beyond that article.

90. **Mr. Neuman** supported Mr. Flinterman's proposal. However, he would not be in favour of eliminating the last sentence, which was extremely important. In its absence, every violation of every statute or regulation would become an issue that the Committee had to review under article 9 solely because the State had included it in its domestic law. He encouraged the Committee not to expand the scope of the paragraph to issues dealt with elsewhere in the general comment, such as paragraph 58.

91. **Mr. Kälin** agreed that the last sentence should be retained, but suggested rewording it to read "such issues are not covered under article 9".

92. **The Chairperson** said that the idea was simply to make it clear that not every violation of every procedural rule relating to the detention process was a violation of article 9.

93. **Mr. Shany** suggested that adding the word "necessarily" to the last sentence would convey that meaning.

94. **The Chairperson** said he took it that the Committee agreed to the proposal by Mr. Flinterman and the insertion of "necessarily" in the last sentence.

95. *Paragraph 23, as amended, was adopted.*

Paragraph 24

96. **Mr. Neuman** said that the recommendation by Austria to provide information leaflets in different languages was commendable best practice, but paragraph 24 was not the place for it.

97. *Paragraph 24 was adopted.*

Paragraph 25

98. **Mr. Shany** asked whether, if a person had been detained for interrogation, paragraph 25 required the State to inform him or her of the identity of the victim even though that would hamper the purpose of interrogation.

99. **Mr. Neuman**, supported by **Ms. Chanet**, said it was his understanding from the Committee's previous experience that if the police wished to interrogate an individual they were obliged to provide that information.

100. **Mr. Bouzid** asked whether arrested persons could also be informed of the witnesses against them.

101. **The Chairperson** said that there was no obligation to provide information on evidence, including witnesses, before charges were brought.

102. **Mr. Neuman** said that there was an escalating set of requirements of notice, some of which fell outside the scope of article 9, which dealt only with the moment of arrest.

103. *Paragraph 25 was adopted.*

Paragraph 26

104. **Mr. Neuman** said the European Union's Agency for Fundamental Rights had commented that the European Union Return Directive required the reasons for detention to be given in writing. However, the Committee's position was that the requirement for notice could be satisfied orally.

105. **Ms. Chanet** said that, in her view, the last sentence of the paragraph was unclear and not particularly helpful.

106. **Mr. Rodríguez-Rescia** agreed with Ms. Chanet, adding that the last sentence could be potentially harmful. The footnote did not refer to any case dealing with omission of notification because an illegal substance had been found. In his view, lack of notification was only valid in the second example, i.e. when the individual had brought the crime to the attention of the police.

107. **Mr. Ben Achour** proposed replacing "*disposition*" with "*règle*" in the French version.

108. **Mr. Zlătescu** suggested rewording the second sentence to read "in a language and manner that the arrested person understands".

109. **The Chairperson** proposed rewording the beginning of the third sentence to read "Exceptionally, notification may be implicit".

110. **Mr. Seetulsingh** said that he would favour deletion of that last sentence. For example, a person arrested in a foreign country for possession of cannabis, which was legal in his country of origin, would still have to be notified of the reasons for his or her arrest.

The meeting rose at 1.05 p.m.